

United States Bankruptcy Court
Eastern District of Michigan
Southern Division

In re:

Sun Valley Foods Co., Inc.,
Debtor.

Case No. 84-03810-R
Chapter 11

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Amended Opinion Regarding Fee Application

I.

Sun Valley Foods filed its chapter 11 petition on October 10, 1984. Prepetition, George Ward represented Sun Valley Foods in state court in a lease dispute with its landlord, Detroit Marine Terminals (“DMT”). The dispute led to extensive litigation in the two years before the bankruptcy filing. When it became apparent that the debtor would have to file for bankruptcy protection, Ward recommended that the debtor retain attorney Richard Fellrath of the firm of Stern, Milmet, Vecchio, Goll & Carnago, P.C., of which Ward was of counsel.

Fellrath filed the bankruptcy petition on behalf of the debtor. The Order Appointing the Debtor in Possession, entered October 12, 1984, authorized the debtor-in-possession to employ Richard Fellrath as its attorney. DMT filed an adversary proceeding against the debtor to enforce a state court eviction order. The debtor retained Ward to represent it in the adversary proceeding.

On January 29, 1985, Milmet, Vecchio, Ward & Carnago, P.C., filed its first petition for allowance of fees as attorney for the debtor. The fee application sought attorney fees of \$56,550.80 and expenses of \$3,469.37 for the period October 9, 1984 through December 21, 1984. The application included fees for the services of George Ward. DMT objected on the grounds that Ward’s services produced no benefit to the estate. Bankruptcy Judge Brody allowed fees in the amount of

\$35,000, but held in abeyance a decision on the remainder of the fees until resolution of the litigation that Ward was handling for the debtor. Judge Brody stated that if Ward was unsuccessful, there would be no benefit to the estate and thus no fees should be awarded.

On August 15, 1985, Milmet, Vecchio, Ward & Carnago, P.C., filed its second petition for fees seeking attorney fees of \$36,076.25 and expenses of \$1,937.03 for the period December 21, 1984 through July 2, 1985. Again, DMT objected on the grounds that the services of George Ward were of no benefit to the estate. On September 30, 1985, the Court entered an order allowing fees in the reduced amount of \$30,000.

On January 27, 1986, Milmet, Vecchio, Ward & Carnago, P.C., filed its third fee application, seeking fees of \$24,803.75 and expenses of \$2,196.96 for the period July 3, 1985 through November 13, 1985. Again, DMT objected on the grounds that Ward's services were of no benefit to the estate. The Court conducted a hearing on the fee application and took the matter under advisement.

On September 11, 1986, Milmet, Vecchio, Ward & Carnago, P.C. filed its fourth fee application seeking fees of \$53,622.50 and expenses of \$4,931.85 for the period November 1, 1985 through June 30, 1986. The creditors committee filed an objection to the reasonableness of the fees.

On November 5, 1986, the debtor filed a malpractice action in state court against Richard Fellrath, George Ward, and Milmet, Vecchio, Ward & Carnago, P.C.

On January 27, 1987, Milmet, Vecchio, Ward & Carnago filed its fifth and final fee application, seeking fees of \$8,835 and expenses of \$343. On March 10, 1987, the Court entered an order taking the fee application under advisement until the conclusion of the state court malpractice action. On April 28, 1987, the Court entered an amended order stating that all fees pending or which had previously been awarded would be taken under advisement pending a decision on the state court

malpractice action.

Twelve and a half years later, on July 30, 1998, the debtor entered into a settlement agreement in the malpractice action with Richard Fellrath, Morris Milmet, Frank Vecchio, Milmet, Vecchio, Goll & Carnago, and Butzel Long, P.C., the successor firm to Milmet, Vecchio, Goll & Carnago. The agreement specifically excluded George Ward or George Ward, P.C. and provided that the settlement was not intended to affect any right George Ward may have to unpaid attorney fees from the debtor.

Six years later, on August 13, 2004, the state court entered a judgment in favor of George Ward and George Ward, P.C. on the debtor's malpractice action.

On December 14, 2004, George Ward filed a motion to reopen this bankruptcy case for purposes of collecting the fees that were allowed but held in abeyance and to have the remainder of the fees decided. On March 14, 2005, the Court entered an order reopening the case.

II.

The debtor objects to Ward's fee request on numerous grounds, including: 1) neither Ward nor the Law Firm were ever authorized to represent Sun Valley pursuant to 11 U.S.C. § 327; 2) Ward was not disinterested because he and the Law Firm held a prepetition claim against the debtor; 3) neither Ward nor the Law Firm made the required disclosures under 11 U.S.C. § 329 and Bankruptcy Rule 2016 regarding their prepetition transactions with the debtor; 4) the legal fees at issue belonged to the Law Firm, not Ward, and the Law Firm waived its right to the legal fees as part of the state court malpractice litigation settlement; 5) all disbursements required to be made under the plan have been made and there are no funds left to satisfy Ward's claims; 6) to the extent the fees are sought from the reorganized debtor, they are barred by the 6 year statute of limitations for contractual claims under Michigan law; and 7) the fees sought are excessive and did not provide a benefit to the estate.

Ward contends that he was properly authorized to represent the debtor and he was disinterested. Ward argues that the board of Sun Valley authorized the employment of the Law Firm and Ward. Further, Ward contends that the Court authorized the employment of Richard Fellrath, who was a member of the Law Firm. Therefore, Ward contends, the Court approved of the debtor's selection of counsel.

Ward further contends that pursuant to 11 U.S.C. § 1107(b), his prepetition representation of the debtor does not disqualify him.

Ward also argues that even if he was not authorized by the Court to represent the debtor, fairness and equity would justify nunc pro tunc approval of his employment.

In response to the debtor's argument that the Law Firm waived Ward's claims for legal fees, Ward argues that his claims were separate from the Law Firm's claim and the Law Firm did not have authority to waive Ward's fees.

Ward also contends that his services did benefit the estate because as a result of its successful reorganization, Sun Valley was relieved of over \$3.1 million in debt.

III.

The Court must conclude that Ward is not entitled to any fees. Contrary to Ward's assertion, he does not hold a claim for fees separate from the claim of the Law Firm and the Law Firm has clearly waived its claim against the debtor. Beyond that, the record establishes that Richard Fellrath was authorized by the Court to represent the debtor. The five fee petitions were filed by Fellrath's firm and any claim for fees belonged to the Law Firm.

Ward provided an assignment and hold harmless agreement from Butzel Long, P.C., the successor to the Law Firm, in which Butzel Long purports to assign to Ward any of its remaining

rights, title and interest in the petitions for attorney fees filed by the Law Firm. However, this does not help Ward at this point; Butzel Long had previously waived its right to any fees from the debtor and had no remaining interest to assign.

Finally, the Court must conclude that there is no basis, over twenty years after the fact, to appoint Ward separately on a nunc pro tunc basis. *Frank v. Pica Sys. Inc. (In re Pica Sys., Inc.)*, 124 B.R. 30 (E.D. Mich. 1991).

Accordingly, George Ward's fee application is denied.

_____/s/_____
Steven Rhodes
Chief Bankruptcy Judge

Entered: September 2, 2005

cc: George E. Ward
Terrance A. Hiller, Jr.

Not for Publication